UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ROSY GIRON DE REYES, et al,	)	
	)	Civil 16-563
Plaintiffs,	)	
v.	)	
	)	Alexandria, Virginia
WAPLES MOBILE HOME PARK LIMITED PARTNERSHIP, et al,	)	November 8, 2019
Defendants.	)	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE T. S. ELLIS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Simon Yehuda Sandoval-Moshenberg
Gianna Puccinelli

For the Defendants: Michael Sterling Dingman
Grayson Hanes

Court Reporter: PATRICIA A. KANESHIRO-MILLER, RMR, CRR

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P R O C E E D I N G S

(2:41 p.m.)

THE DEPUTY CLERK: Civil Case Giron de Reyes, et al., versus Waples Mobile Home Park Limited Partnership, et al., Case Number 2016-CV-563.

May I have appearances please, first for the plaintiff.

MR. SANDOVAL-MOSHENBERG: Yes. Good afternoon. Simon Sandoval-Moshenberg of the Legal Aide Justice Center for the plaintiffs. With me is pro hac vice counsel Gianna Puccinelli of the law firm Quinn Emanuel, who will be arguing this afternoon.

THE COURT: All right. Good afternoon to both of you.

For the defendants?

MR. DINGMAN: Good afternoon, Your Honor. Michael Dingman and Grayson Hanes for the defendants.

THE COURT: All right. Good afternoon to you all.

All right. The movant today is the defendant. Let me hear first from you.

Your briefs on both sides have been reviewed. I have some knowledge of this. But let me give you an unfettered opportunity to speak for about 10 or 15 minutes. I do have one question for you later on. But go ahead and tell me what you think I should know.

MR. DINGMAN: Yes, sir.

Well, as the Court is aware, this case is before the Court on summary judgment on remand from the Fourth Circuit with respect to the disparate impact claim only.

In the appeal, the Fourth Circuit found that the Court had improperly granted a motion to dismiss with respect to the disparate impact claim and remanded it specifically for consideration of that claim on summary judgment.

In their briefs, the plaintiffs seem to suggest that the Fourth Circuit went further than that and granted summary judgment with respect to the prima facie case, or step one, as they call it, of the analysis. I think the decision of the Fourth Circuit is very clear and that the Court was looking at this as a motion to dismiss appeal. That's how it was proffered by the plaintiffs.

In fact, the defendants asked the Fourth Circuit to consider the summary judgment record. Plaintiffs opposed that. We quoted in our brief, Fourth Circuit brief, asking the Court not to, quote, sift through the facts.

The Court started its analysis by citing the standard Rule 12(b)(6) standards of review, and when it completed its analysis, the Court came to the conclusion that the motion to dismiss was improperly granted, and it remanded the case for consideration, and it specifically said the district court should have addressed the FHA claim of disparate impact

theory of liability at the motion for summary judgment stage. And therefore, the Court remanded it specifically for that purpose.

I think it is also important, Your Honor, to look at the Court's ruling after it completed its analysis. Under the Rule 12(b)(6) requirements, it said the following:

"At the motion-to-dismiss stage, we must accept all well-pled facts as true and all reasonable inferences in favor of the plaintiff. Therefore, accepting these statistics as true, referring to the statistics in the complaint, we conclude that plaintiff sufficiently alleged a prima facie case of disparate impact."

But a suggestion that the Fourth Circuit went beyond that and made some summary judgment ruling has no basis in their opinion. There is no discussion of the summary judgment standard, and the court made it very clear that it was remanding to this court to take up this issue on summary judgment, which of course was not done previously. So there wasn't even a summary judgment decision to be reviewed by the Fourth Circuit.

So turning now to the substance of the claim, Your Honor, as we have discussed with this Court and briefed many times, the *Inclusive Communities* case is controlling. In that case, the U.S. Supreme Court recognized disparate impact as a claim under the Fair Housing Act for the first time but,

in doing so, went out of its way to state that it was enacting what it referred to as cautionary standards, to make sure that the Fair Housing Act disparate impact claim did not improperly impose requirements on both public bodies and private developers with respect to their housing decisions.

One of the primary cautionary standards that the court set forth -- and it repeats this throughout its opinion -- and I will talk about that in some detail -- it is that the disparate impact claim under the Fair Housing Act could only be established if the underlying policy is artificial, arbitrary, and unnecessary. And the Court uses that phrase multiple times in its opinion. And it does so because it was clear that, in recognizing disparate impact under the Fair Housing Act claim, it was not inviting courts to second-guess policy decisions by public bodies or by private developers. In fact, it specifically addressed the erroneous assumption in its opinion. The Court said the following:

"This case on remand may be seen simply as an attempt to second-guess which of two reasonable approaches that housing authorities should follow in the sound exercise of its discretion in allocating tax credits for low-income housing."

Immediately after that, the court says the following: "An important and appropriate means of ensuring that

disparate impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies."

It goes on to say, "Disparate impact mandates the removal of artificial, arbitrary, and unnecessary barriers."

The court went on in its opinion to expand upon that, and it said the following: "Governmental or private policies are not contrary to the disparate impact requirement unless they are artificial, arbitrary, and unnecessary."

The Court reiterated that a second time and said the following: Were standings for proceeding with disparate impact suits not to incorporate at least the safeguards discussed here. The disparate impact liability might misplace valid governmental and private priorities rather than solely removing artificial, arbitrary, and unnecessary barriers, and that, in turn, would set our nation back in its request to reduce the salience of grace in our social and economic system."

So the Supreme Court said, unless the policy is artificial, arbitrary, and unnecessary, it does not violate the Fair Housing Act, and that disparate impact was intended solely to address policies that are artificial, arbitrary, and unnecessary.

In their briefs, the plaintiffs discount that repeated mantra from *Inclusive Communities* and treat it as

meaningless. But in fact, it is a basis for an analysis of any Fair Housing Act disparate impact claim. We identified for the Court a number of other federal courts post-*Inclusive Communities* who have come to that same conclusion, including two circuit courts. In *Communities v. Property Company*, at 920 F.3d 890, the Fifth Circuit said the following: "We read the Supreme Court's opinion in *ICP*, *Inclusive Communities*, to undoubtedly announce a more demanding test, as set forth in the HUD regulations. As noted by a Minnesota district court, the Supreme Court announced several safeguards to incorporate into the burden-shifting framework to ensure that disparate impact liability does not replace governmental and private priorities."

The court went on to conclude accordingly. "As noted by the Fourth Circuit in the Reyes decision here, we were bound to apply the stricter version of the burden-shifting analysis." And the Court went on to hold that unless the policy is shown to be artificial, arbitrary, and unnecessary, there is no disparate impact claim.

The Eighth Circuit came to the same conclusion in *Ellis v. City of Minneapolis*. Again, citing almost verbatim the language from the Supreme Court's decision in *Inclusive Communities* regarding artificial, arbitrary, and unnecessary policies, it said the following: "The Courts warned disparate impact liability might displace valid governmental

and private priorities rather than solely removing artificial, arbitrary, and unnecessary barriers."

The plaintiffs have not cited to this Court a single case where a federal court has come to the conclusion that the Supreme Court's repeated reference to artificial, arbitrary, and unnecessary policies is meaningless. It is, in fact, the essence of that decision. And they have provided no facts for this Court that can possibly satisfy that requirement.

The policy at issue -- and there is no dispute about this -- is intended to assist in leasing decisions, credit checks, background checks, avoiding criminal liability under the anti-harboring statute. There are no facts to suggest those are artificial interests as opposed to valid interests. In fact, this Court found as much in its prior decision on summary judgment with respect to disparate treatment. Nor can there be an argument that using Social Security numbers and valid U.S.-issued identification is arbitrary and artificial. At the end of the day, the plaintiffs' case is simply we believe you can use ITINs or foreign passports -- and I will talk about that more in a moment -- that's a good alternative. That's not what the Supreme Court created when it recognized disparate impact under the Fair Housing Act.

THE COURT: A good alternative to what?

MR. DINGMAN: To the policy that requires a Social Security number or a valid U.S. document showing legal presence in the United States.

So what they're doing essentially --

THE COURT: -- going to come back in a moment as to why those two -- that is, the passport and the tax ID numbers -- in your view are not sufficient.

MR. DINGMAN: Yes, sir.

THE COURT: All right. That seems to be the principal focus of the parties' dispute.

MR. DINGMAN: I agree with the Court.

And the point I'm making at this stage is that the Supreme Court did not suggest that the federal court should second-guess what are valid policy decisions simply because one party says, well, I think you can do sort of the same thing with this policy, or you should build that housing development here instead of there. If it is a -- if a valid interest has been demonstrated -- and that's the language used by the Supreme Court in *Inclusive Communities* -- and it is not arbitrary or artificial, then there cannot be a disparate impact claim under the Fair Housing Act. Otherwise, courts would be invited to second-guess housing decisions, which the Supreme Court expressly said, in *Inclusive Communities*, it was not intending to create with a disparate impact claim under Fair Housing.

There is also one other overarching issue in this case before we get to the three-step analysis, and that has to do with the Supreme Court also finding in *Inclusive Communities* that there cannot be a disparate impact claim under the Fair Housing Act if the policy is required, or the defendant in this case, is substantially limited in its discretion with respect to the policy. And we have discussed and argued with this Court, and Your Honor wrote about this in your summary judgment opinion, the impact of the anti-harboring statute as it was applied by Judge Trenga and this Court and then interpreted by the Fourth Circuit in the *Aguilar* case.

At the heart of that case, Your Honor --

THE COURT: Which case?

MR. DINGMAN: *United States v. Aguilar*.

THE COURT: All right. Go on.

MR. DINGMAN: The Court was presented with the issue of whether substantial facilitation requirements so-called was necessary for a conviction under the anti-harboring statute as opposed to a reckless disregard of information that would put one on notice that the person that you're leasing to is in fact in the United States illegally. The conviction was upheld, and the Fourth Circuit said two things that I think are very important. First, it said, "A defendant acts with reckless disregard where she is aware of

but consciously ignores facts and circumstances clearly indicating that an individual is an undocumented alien." The court then said: "Circumstantial evidence alone can establish the defendant's knowledge of reckless disregard that the people harbor are illegally in the country."

And one of the facts that the Fourth Circuit pointed out in affirming the conviction in that case was that the defendant admitted, quote, that it was the same to her whether her tenants possessed proper documentation or did not.

In response, the plaintiffs point to cases from other circuits, which are not binding. They suggest that this Court should ignore *Aguilar* because they claim it is an unpublished opinion. In fact, when you look at the opinion, it refers to Appellate Rule 32.1, which only discusses unpublished decisions prior to January 1, 2007. This case is, in fact, binding on this Court. It is the only case in which the Fourth Circuit has addressed the standards for a criminal conviction under the anti-harboring statute.

When you apply that finding to the facts here, it is clear that the defendants are substantially limited in their discretion. What is being suggested is defendants should ignore the fact that there are illegal aliens or undocumented aliens, however you want to describe them, at the park, applying to live at the park, living at the park. The

essence of the plaintiff's case is that there's a large group of undocumented aliens living at the park. When they're asked to provide basic documentation and they cannot, that is a further indication that they're in the United States illegally.

Plaintiffs have even suggested that the four female plaintiffs in the case should be able to come back and live at the park. Well, it is undisputed that they're in the United States illegally.

THE COURT: Come back and do what? I'm sorry.

MR. DINGMAN: Live in the park. Move back in.

THE COURT: All right.

MR. DINGMAN: In that instance, the defense would have actual knowledge that they were renting to someone who is in the country illegally.

So the discretion is substantially limited here because any landlord under those facts and circumstances would be compelled to do exactly what the policy does here, which is to ask for, if you do not have a Social Security number, proof of legal residency in the United States.

Turning now to the three-step process under HUD, which, by the way, is not controlling. The Fourth Circuit itself in the appeal in this case specifically found, as all the circuit courts have and must, that the Supreme Court's decision in *Inclusive Communities* controls, not the HUD

guidelines.

So the first step, the plaintiffs are required to show that there will be a disparate impact as a result of this policy and they must establish a robust causal connection between the policy and the claimed impact.

With respect to causality, there is none. At the summary judgment stage, the Court is no longer confined to the allegations in the complaint. The Court can look at the actual facts in this case. And the actual facts in this case demonstrate beyond any doubt that the only reason that the plaintiffs are impacted at all is because of the illegal status of the four female plaintiffs. That's it.

The four male plaintiffs who have proper documentation, who are in the United States illegally, admitted that yes, we complied with the policy --

THE COURT: Who are in the United States legally or --

MR. DINGMAN: Legally.

THE COURT: I thought you said "illegally."

MR. DINGMAN: If I did, I apologize, Your Honor. That was not my intent.

THE COURT: Go ahead.

MR. DINGMAN: So there is no robust causality.

The second piece, Your Honor, is it is the plaintiffs' burden to prove that there will be a disparate

impact. They rely primarily on testimony from an expert witness, Professor Clark, regarding the undocumented population.

One of the things that the Supreme Court -- I'm sorry -- the Fourth Circuit talked about in the appeal in this case was you have to look at the impact on Latinos as a class. There is no evidence presented by the plaintiff that as a result of this policy the number of Latinos who lease at the park has declined, that the number of applicants rejected has increased, that the number of Latino occupants has declined. There is absolutely no evidence that has been presented to show that this policy has impacted Latinos as a class at all. Instead, their case is predicated solely on the undocumented Latinos, which again gets you back to the causality. You can't disconnect those two things.

So, first of all, there is no evidence that shows that Latinos as a class have been impacted. With respect to the undocumented population, they rely solely on the opinions of Professor Clark, which are completely unreliable based upon his own admissions. And this is not, as the plaintiffs suggest, a contest between two experts. What we are saying to the Court and what we think is clear from Professor Clark's own admissions is that his opinion is completely unreliable for two fundamental reasons.

Professor Clark testified -- it is in his report as

well -- that in looking at the undocumented population, he relied solely on statistics and information from the Center for Migration Studies, referred to as CMS. He looked at what was referred to as the Burke PUMA, which is a section of Fairfax County that has a population of 157,949 people. CMS estimated that 31.4 percent of the Latino population in the PUMA are undocumented. But his opinion was based on the undocumented population in Census Tract 4406, which Professor Clark says has a population of 5,944 people, roughly 3 percent of the population of the PUMA.

So what does Professor Clark do? He takes a 31.4 percentage of undocumented Latinos at the PUMA level and applies it at the tract level with no change. And Professor Clark himself admitted in his deposition that as you go from a larger population to a smaller population, the percentages and your margin of error -- which we will be talking about in a minute -- are less reliable for obvious reasons. You're going from a review of almost 160,000 people to a review of 6,000 people, and he uses the same percentage with no change. It defies his own description of what is necessary for valid statistical analysis.

The second part of his error is what is called the margin of error. Again, Professor Clark admitted that's an important element in determining the reliability of any statistical analysis because, in his words, it is an

estimate, it is not a count. In any statistical analysis, you have to have a margin of error. So how did Professor Clark come up with this margin of error here?

Well, he could have used CMS data. CMS, at the national level, has a margin of error of 9 percent. He ignored that. Instead, there is another survey called the American Community Survey that does not track or document illegal aliens. It simply does a review of the population.

At the track level, ACS said, with respect to all Latinos, not undocumented, its margin of error was 26 percent. That's the same margin of error that Professor Clark uses for his estimate of the undocumented population despite the fact that Professor Clark himself said that it is much harder to track the undocumented population for the obvious reason that they don't want to be found. And he admitted in his deposition, well, maybe it could have been higher.

So if you just apply Professor Clark's own testimony, it is clear that the MOE of 26 percent had no basis. He is taking an MOE for all Latinos and applying it to a subset of undocumented Latinos, with no change. And he could have used the CMS percentage at the national level because he used CMS data all the way through his process of analysis, but he chose not to. Without knowing what his MOE actually is, there is no basis for this Court to accept his opinions. And

the only point where there might be an argument that there is a duel of experts is our expert, Dr. Weinberg -- who worked at the Census Bureau for many years -- stated in his report a 26 percent margin of error makes that estimate unreliable. And if you look at just the numbers and the swing, and in Professor Clark's own report, the variation with respect to how many undocumented Latinos are in this tract goes from 223 to 379. And he has a similar swing with respect to Asian undocumented aliens in the same tract. That's just not reliable. And the fact is, as Professor Clark's admissions show, is that MOE must be higher because he is trying to document a different population that he himself testified does not want to be found. So they have failed to show any statistical basis for disparate impact. For that reason, summary judgment should be granted.

With respect to step two -- and I will try to pick up the pace here, Your Honor -- there is a dispute between the plaintiffs and the defendants as to what is the standard. They claim that we have to show a business necessity. But that's not what the Supreme Court said in *Inclusive Communities*. I quoted this previously in my argument. What the Supreme Court said is, if a party shows a valid interest, then that's sufficient. That's the standard in *Inclusive Communities*, show a valid interest. And the court says that --

THE COURT: What is the valid interest here?

MR. DINGMAN: The valid interest here -- and this is something that was addressed by Your Honor in your summary judgment opinion, is to make leasing decisions, to conduct credit checks, to conduct criminal background reviews, and to avoid criminal liability under the anti-harboring statute. Those are all clearly valid interests. In the Court's summary judgment opinion -- and I understand that was with respect to disparate impact -- the Court said the following --

THE COURT: No, it was with regard to disparate treatment.

MR. DINGMAN: I'm sorry. Yes, sir.

The Court said the following: "Defendants had met their burden of production to articulate legitimate nondiscriminatory justifications for the policy." And the Court identified confirming lease applicants' identities, performing criminal and credit background checks, minimizing loss of eviction, to avoid potential criminal liability under the anti-harboring statute. Frankly, Your Honor, the plaintiffs have not contended that these are not valid interests. Now, they argue on the anti-harboring statute that since courts outside the Fourth Circuit have taken a different approach that we should somehow feel comfortable that there is no exposure to criminal liability. But they

have not proffered any facts nor any expert to say that it's unreasonable for a landlord to conduct criminal background checks. There is no valid interest in doing credit checks. There is to valid interest in going through a lease underwriting process. They have no facts to refute the evidence that has been presented.

One of the things they do is attack the expert that we proffered, Mr. Caruso, but they have no expert to contradict his testimony. And what is important in his opinion -- it's primarily -- to a large extent, it is based on his experience. He testified that he managed tens of thousands of residential units; and in doing so -- for a number of different landlords -- they implemented the same policy of requiring this type of documentation.

CoreLogic, who is a third-party entity who does the criminal background checks and credit checks, asked for the same documentation under the policy. What facts have the plaintiffs presented to show that these are not valid interests? None. No one.

So the last argument is, well, there's a better way to do this. You're not required -- you can get the information you need to do your credit checks and your criminal background checks through ITINs and through foreign passports. And Your Honor is exactly right, that's been the essence of this case from the beginning. If you go back and

you read paragraph 32 of the Complaint, that's precisely what they said. You can achieve your credit and criminal background checks by using ITINs and foreign passports.

We have provided unchallenged statements from the IRS that says ITINs are not reliable, they were never intended for identification purposes.

As we have made clear -- and again, there is no factual dispute -- the first step in any valid check -- background check, credit check -- is making sure that the identity of the person who is being the subject of that check is who they say they are.

THE COURT: Well, a passport would do that; wouldn't it?

MR. DINGMAN: A passport from a foreign government that we have no idea how exactly it was put together or what the requirements were to obtain it? One of the plaintiffs in this case used a fake passport to gain entry into this country.

In the United States -- and this is also uncontradicted -- because this is exactly what the male plaintiffs did -- they had to go through an in-person interview. A man looked across the table at them and verified who they are and who they say they are. They were fingerprinted. That's how they obtained their documents that satisfied the policy.

How a foreign government issues its passports, as Your Honor was talking about in some of the cases, who knows? Who knows what the process is?

So what is being suggested is rely on ITINs, which the IRS itself says are not reliable. We don't issue these numbers for identification purposes. And in the information we submitted, the IRS has said it's abused significantly. Why? Because there is no in-person interview. All you have to do is send in documents and you receive an ITIN. There is no one who's identifying that you are who you say you are in that application. That's why the policy requires a Social Security number or documentation that the person is legally in the United States because there is a process -- it is not infallible -- as Your Honor pointed out previously, any document can be the subject of a forgery, but these are the best and most reliable indices of the identity of the person who is being asked to submit to the credit check or the criminal background check. And this gets again to this overarching requirement that the policy be shown to be artificial, arbitrary, and unnecessary.

We're here discussing, well, are ITINs and Social Security numbers the same. We clearly say that they're not, and so does the IRS. But this is not the kind of debate that the Supreme Court intended when it made its decision in *Inclusive Communities*. There is no dispute that asking for

Social Security numbers in these documents is a reasonable thing to do. So how can there be disparate impact liability as outlined in *Inclusive Communities*.

And to put an end to that, Your Honor, in their brief, in their step three analysis, what the plaintiffs suggest is, well, you could use exactly what the policy requires with respect to lessees. A contention that there is no other way to do it. But they say, with occupants, and they're referring to the female plaintiffs, ITINs and foreign passports are good enough. Well, that makes no sense. The issue here is identity verification. You can -- it doesn't matter whether you're a lessee or an occupant, if your identity is not validated, whatever check is done is worthless. So there is no distinction whether you're a lessee or an occupant as to what is necessary at the first step to identify this person.

So they have now conceded, with a lessee, there is no other way. That's their step 3 proposal.

THE COURT: What did the spouses, the men, what did they submit?

MR. DINGMAN: The men had temporary passports or visas that were validly issue by the United States government. And we went through in our prior submissions, based on the testimony of the male plaintiffs and their discovery responses, that they were fingerprinted, that they

were interviewed, they have to go back I think on an annual basis. So there is a process that they went through. They were fingerprinted, and they have to continually engage in this process on an ongoing basis. The female plaintiffs have done none of that.

So they say, well, they have ITINs. Well, I can take any document and send it to the IRS and get an ITIN. Even as a woman. No one is looking across the table and saying, are you the person who is submitting this application. There is absolutely no verification, which is why the IRS itself says it is rife with fraud. And it is not reliable for identification purposes.

So there is no other alternative that satisfies the identification requirement of this policy. And more to the point, Your Honor, again, this is not what the Supreme Court intended when it recognized disparate impact under the Fair Housing Act.

The plaintiffs actually argue that this court should find that the policy's artificial and arbitrary because they contend ITINs are a reasonable substitute. That doesn't make the policy arbitrary or artificial. And it gets the Court into second-guessing, which you don't want to, because the Supreme Court said, if we go down that path, then we're going to inject race into every decision, and we're going to confront some difficult constitutional issues. That's why

we're not second-guessing. We're saying, if a private entity or a public body has a valid interest in the policy at issue, then there is no violation of the Fair Housing Act under disparate impact liability claim. There are no facts to show that this policy is arbitrary or artificial or unnecessary. In fact, the plaintiffs have not proffered any facts to challenge that, and we would ask that the Court grant summary judgment.

THE COURT: All right. Thank you.

Ms. Puccinelli.

MS. PUCCINELLI: Yes, Your Honor.

Your Honor, I quickly wanted to start off this afternoon by correcting a few things regarding both the posture of the case before the Fourth Circuit as well as the standard that the Fourth Circuit has mandated be applied in this case at this stage of the analysis.

Defendants have said that the Court, in its motion to dismiss decision, dismissed the disparate impact claim. And then the Fourth Circuit remanded again to consider summary judgment on the disparate impact claim. In reality, while this Court found that the plaintiffs could not use disparate impact to proceed with their Fair Housing Act claim, it did not dismiss the Fair Housing Act claim until the summary judgment stage. So the Fourth Circuit, in considering plaintiff's appeal, was actually considering both the motion

to dismiss decision and the motion for summary judgment decision.

THE COURT: Can you point to language in the Fourth Circuit opinion that makes that clear?

MS. PUCCINELLI: Yes, Your Honor.

"On appeal, plaintiffs contend that the district court erred in granting Waples' motion for summary judgment on the FHA claim. Moreover, plaintiffs argue that the district court erred in concluding that their FHA claim could not continue past the motion to dismiss stage under a disparate impact theory of liability." And that's erred in failing to substantively address this theory considering the cross motion for summary judgment, and that is on page 422, Your Honor.

THE COURT: That doesn't mean the Fourth Circuit ruled on that. I thought that what the Fourth Circuit said is a disparate impact wasn't appropriately addressed at the motion to dismiss stage but ought to be appropriately addressed at the summary judgment stage.

MS. PUCCINELLI: Correct, Your Honor, but the court needed to reinstate the plaintiff's Fair Housing Act claim in order to return it to this case so that summary judgment could be reconsidered.

THE COURT: On disparate impact?

MS. PUCCINELLI: Correct.

THE COURT: I'm not sure I see how you and the defendant are in disagreement.

MS. PUCCINELLI: Just that the Court was considering both the summary judgment ruling that this Court made and the motion to dismiss ruling --

THE COURT: But they didn't rule on summary judgment. They didn't remand and say, okay, it's all over on disparate impact.

MS. PUCCINELLI: Correct, Your Honor. But they needed to reinstate the Fair Housing Act claim.

THE COURT: But only the disparate impact portion of it.

MS. PUCCINELLI: Yes.

THE COURT: All right. Go on.

MS. PUCCINELLI: And contrary to what the defendants have represented, there are, in fact, two controlling decisions in this case," *Inclusive Communities*, as well as the Fourth Circuit's decision. And the Fourth Circuit set forth the standards to apply at each stage of the disparate impact analysis. Under -- and this is at page 424. And the court said, "under the first step, the plaintiffs must demonstrate the robust causal connection between the defendant's challenged policy and the disparate impact of a protected class.

It goes on to state, "Under the second step, the

defendant has the burden of persuasion to state and explain the valid interests served by their policies," and then in parentheses, "citing to *Inclusive Communities*, stating that this step is analogous to Title VII's business necessity standard. So defendants are, therefore, incorrect in inserting that *Inclusive Communities* did not also require defendants to show a business necessity.

THE COURT: Well, they are correct because that is not in any *Inclusive* opinion. It is in the Fourth Circuit opinion.

MS. PUCCINELLI: It is also in *Inclusive Communities*, Your Honor.

THE COURT: Oh, it is? What page is that on?

MS. PUCCINELLI: That is on page 2522.

THE COURT: All right. Go on.

MS. PUCCINELLI: In the third step of the framework, the Fourth Circuit says, "In order to establish liability, the plaintiff has the burden to prove that the defendant's asserted interests could be served by another practice that has a less discriminatory effect."

THE COURT: That is the real gist of your argument here. You think that the tax ID numbers and the foreign passports would satisfy any legitimate interests they have and would not have any discriminatory impact.

MS. PUCCINELLI: Correct, Your Honor.

THE COURT: What do you say to their argument to the contrary, that the tax numbers are not reliable, nor are foreign passports?

MS. PUCCINELLI: Well, Your Honor, defendants have not offered any actual evidence that foreign passports are not reliable. They only have testimony from their expert, Mr. Caruso, who notably has his primary experience in the form of federally funded housing; whereas, defendants --

THE COURT: Well, they have offered evidence, but you say that evidence isn't very persuasive.

MS. PUCCINELLI: Correct, Your Honor.

THE COURT: That's a better way to put it, not that they haven't offered evidence.

MS. PUCCINELLI: Well, Your Honor, Mr. Caruso merely states that the U.S. system of identifying identity is the gold standard. He doesn't actually tear down any foreign governments's other similar efforts to verifying identity through the granting of passports.

Also, Your Honor, plaintiffs have provided evidence that neither a Social Security number, nor even an ITIN are necessary to, for example, run credit checks or run criminal background checks. We've put forth a declaration from defendant's current identity verification lease underwriting system, Yardi, that explains all of this, and says that Social Security numbers and ITINs could help to enhance the

reliability of those checks but are not, in fact, necessary to run them.

And returning quickly back to the prima facie case, the first step under the burden-shifting framework, when you look to the Fourth Circuit's opinion, they don't actually articulate any additional steps like what defendants have articulated, including separating out the artificial, unnecessary, arbitrary framework and motivation for disparate impact as a separate step to satisfy in order to put forth a prima facie case. Nor did they actually include this substantial limitation criteria as a part of the first step, either.

Defendants actually argue that before the Fourth Circuit, and the Fourth Circuit still, as you can see on page 425, states that "to establish causation in a disparate impact claim, the plaintiff must begin by identifying the specific practice that is challenged."

They then go on to say a few lines down, "Additionally, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion complained of because of their membership in a protected group." Those are the two steps that are required to show a prima facie case of disparate impact, and that's what plaintiffs have put forward in this case.

And that evidence has come in the form of two separate types of proof, the first being Professor Clark's analysis, which contrary to what defendants have said, is in fact reliable. They did not submit a *Daubert* motion to try and get him kicked out. They have not tried to attack his qualifications. In fact, Professor Clark stands by his methodology as shown in his rebuttal report stating that Dr. Weinberg's analysis has -- he has been unable to replicate it and actually reaches an absurd result by creating a margin that goes from zero to somewhere in the 600s, and points to the fact that his and Dr. Weinberg's point estimates for the number of undocumented immigrants in the track are almost the same, which is a better indicator of the reliability of his estimate than the margin of error, which merely shows a range of potential numbers that could actually contain the true population of undocumented immigrants in the tract.

And plaintiffs have also offered two reports generated by the defendants, which show -- and as this Court recognized in its undisputed facts in its previous summary judgment opinion -- that the majority of individuals, 91 percent in one report, and 84 percent in the other report, of Latinos were impacted by the policy, both of which clearly -- between Dr. Clark's analysis, Professor Clark's analysis and this direct evidence show a disparate impact.

Turning to the second prong of the disparate impact analysis, defendants don't even acknowledge that they had to demonstrate a business necessity, which, as this Court recognized, is a different and more difficult standard to satisfy. And that was from the Court's motion -- ruling on the motion to dismiss. And while defendants' claim that the business objectives that they have put forth are legitimate, they have not shown that they are true business necessities such that the policy is required in order to fulfill them. And that much is evident from the fact that they have not shown that a foreign passport is less reliable than a Social Security number or an ITIN to verify identity. I don't know about anyone else, but I got my Social Security number when I was a baby, so I didn't have anyone sitting across from me interrogating me about my criminal history or anything like that. So the fact that the male plaintiffs may have undergone that interrogation in order to get their own Social Security numbers is not dispositive for the majority of the population.

And going to the next business justification, plaintiffs have offered proof that a Social Security number and other documentation are not actually needed to run a credit check, and credit checks are not even run on all of the occupants of the park, they are only run on the actual lessees.

And turning to the next business justification, we have the criminal background checks. The female plaintiffs can get criminal background checks without having a Social Security number. In fact, Rosy Giron de Reyes, one of the named plaintiffs in this case, received a criminal background check and attempted to offer it to defendants to satisfy their policy and was rejected.

And as to release underwriting concerns, plaintiffs have demonstrated that -- the male plaintiffs alone who validly under the policy applied for leases and were granted leases qualified for receiving, using their own credit, using their own income, without the female plaintiffs at all. And that is why that dovetails with our third step, which is why we have offered this proposed alternative to the policy that has a less discriminatory effect because we have this clear situation where you have a male plaintiff who goes to the leaseholder office, is evaluated under his own merits, irrespective of the other occupants of his home, is granted a lease. There is simply no need to go through the rigamarole of checking out the wife's requirements as well just because she is there. We concede, though, that there is a business interest in verifying the criminal background checks. But as we have already said -- of occupants -- as we have already said, female plaintiffs can get criminal background checks without Social Security numbers. They have gotten them.

They could satisfy that business interest without the policy as written, without the documents required by the policy.

And as to the anti-harboring interest, the majority of courts that have considered this issue have held that merely renting to undocumented immigrants does not violate the anti-harboring statute.

THE COURT: What about the Fourth Circuit?

MS. PUCCINELLI: In the Fourth Circuit, the defendants' conduct went above and beyond merely renting to undocumented immigrants. She had a history of disregarding warnings regarding the need to -- regarding the need to --

THE COURT: Don't you think there is a split in the circuits about that?

MS. PUCCINELLI: No, Your Honor, because the defendant's conduct in *Aguilar* went above and beyond the conduct that we have even remotely potentially in the case of defendants here. And also, it is worth noting that because when this issue was presented to the Fourth Circuit by defendants, the Fourth Circuit did not credit that the defendants had their hands tied by the anti-harboring provision of the ICRA.

THE COURT: What did the Fourth Circuit say about it?

MS. PUCCINELLI: It didn't say anything about it, Your Honor.

THE COURT: So we really don't know what the Fourth

Circuit would say about whether the anti-harboring statute presents the defendants with any need to get to the bottom of who is staying in some of their apartments.

Your point is there are a number of cases from other circuits that indicate that merely renting to somebody is not harboring, but the Fourth Circuit has a case where that did occur, but you said the conduct went beyond that. So it is distinguishable. I understand the argument.

Go ahead and finish your argument. The hour is late.

MS. PUCCINELLI: Apologies, Your Honor.

And with regard to the third step of the disparate impact analysis, first of all, the Court in this posture need only reach the third step if it finds that there is no dispute of material --

THE COURT: As a concession to the shortness of life, let's get to the bottom. Your view is the defendants should not receive summary judgment. All right. Let's assume that's right. What do you think should go to a jury in this case? What issues should go to a jury in this case?

MS. PUCCINELLI: Your Honor, I think the second and third steps should go to the jury in this case.

THE COURT: Specifically what? What is it a jury is going to be asked to decide on those two steps?

MS. PUCCINELLI: The jury is going to be asked whether a Social Security number or a passport, visa, and

I-94 are necessary to satisfy defendants' five purported business interests.

THE COURT: If you need an opportunity to consult, rather than interrupt your colleague, ask for it, and I will grant it. Otherwise, it is disruptive.

MR. SANDOVAL-MOSHENBERG: Yes, Your Honor. Thank you.

MS. PUCCINELLI: And if the jury does find that those interests are business necessities, whether or not any policy that plaintiffs can articulate essentially shows that those policies are not -- that the policy at issue is not necessary to fulfill the business interests of plaintiffs and can be better served by a less discriminatory policy.

THE COURT: All right. Thank you.

Very brief response.

MR. DINGMAN: Here's my very brief response, Your Honor: As articulated by counsel, their argument is a step three argument. There is no dispute that the policy or the valid interest at step two is verifying identification to conduct these background checks. They do not dispute that that is a valid legitimate interest, business necessity, whatever you want to call it. And I would ask the Court to go back and look at *Inclusive Communities*, because the court there specifically said, if a private entity can show a valid interest, that's enough.

When they get to the foreign passport and point to us and say they have not proven they're invalid, that's not the burden. Your Honor. It's step three, it's plaintiffs' burden to show that they're proffering a viable alternative. So it's their burden to present evidence that foreign passports are sufficient. It is their burden to present evidence that ITINs are just as good. It is not ours.

THE COURT: All right. Thank you. I will take the matter under advisement, and you'll hear from me on it.

(Proceedings adjourned)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Patricia A. Kaneshiro-Miller, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Patricia A. Kaneshiro-Miller — May 1, 2020

PATRICIA A. KANESHIRO-MILLER — DATE

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